

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-4179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM J. McDONALD, SR., and ELIZABETH J. McDONALD,
Appelles

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEES

WILLIAM J. MC DONALD, Esq. Pro se
WILLIAM J. MC DONALD, JR.
On the Brief

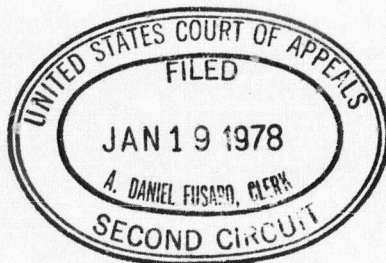


TABLE OF CONTENTS

	Page
Issues To Be Decided -----	1
Statement of Facts -----	1
Summary of Argument -----	2
Argument:	
The Tax Court was correct in ruling that the taxpayer was entitled to a business expense deduction under Section 162 of the Internal Revenue Code of 1954 for \$121,400.00, the amount which he paid in compromise of a Will contest -----	4
Point I. The "origin and character of the claim" test does not apply where a taxpayer makes a voluntary payment in order to preserve his professional reputation despite the fact that collateral litigation has been initiated -----	4
Point II. If the "origin and character of the claim" test applies to the case at bar then the payment is deductible as a business expense because the origin and character of the claim are so intimately related to the taxpayer as an attorney -----	11
Point III. The taxpayer's interest in the estate of the decedent vested at her death; he received his legacy and then made a payment in order to preserve his reputation, not in order to obtain tax-free income -----	16
Conclusion -----	18

CITATIONS

Cases:

<u>Bloodgood v. Lewis</u> 209 NY 95 -----	15
<u>Deputy v. Dupont</u> 308 US 488 -----	4
<u>Ditmars v. C.I.R.</u> 302 F 2d 481 -----	5
<u>Elmer W. Conti</u> 31 T.C.M. 89 -----	10

Cases (continued):

<u>Gould v. Commissioner</u> 64 T.C. 132	9
<u>Kaufman v. Commissioner</u> 12 T.C. 1114	9
<u>Levitt and Sons, Inc. v. Nunan</u> 142 F 2d 795	8
<u>Lilly v. Commissioner</u> 343 US 90	8
<u>Matter of Campbell</u> 170 NY 84	15
<u>Matter of Dunham</u> 36 AD 2d 467	16
<u>Matter of Dunn</u> 205 NY 398	11
<u>Matter of Horton</u> 217 NY 363	6
<u>Matter of Howe</u> 15 AD 2d 396	15
<u>Matter of King</u> 74 Misc 2d 61	6
<u>Matter of Kroos</u> 302 NY 424	16
<u>Matter of Murphy</u> 144 NY 557	16
<u>Matter of Nicholas</u> 33 NY 2d 177	14
<u>Matter of Putnam</u> 257 NY 140	14
<u>Matter of Roe</u> 65 Misc. 2d 143	6
<u>Matter of Schillinger</u> 258 NY 186	16
<u>Matter of Waring</u> 293 NY 186	17
<u>Matter of Wilson</u> 298 NY 398	17
<u>Matter of Zurkow</u> 74 Misc. 2d 736	14
<u>Pepper v. Commissioner</u> 36 T.C. 886	9
<u>Snow v. Commissioner</u> 31 T.C. 585	8, 9
<u>Straub v. Granger</u> 143 F Supp. 250	8
<u>Stringer v. Young</u> 191 NY 157	16
<u>United States v. Gilmore</u> 372 US 39	4, 7, 8, 11
<u>Welch v. Helvering</u> 290 US 111	8
<u>William L. Mitchell</u> 52 T.C. 170	10
<u>Woodward v. Commissioner</u> 397 US 572	5

Appellate Division Rule:

Appellate Division Rule, Fourth Department, Section 1022.17	11
--	----

Treatise:

Warren's Heaton on Surrogate's Courts, Volume 2A	6, 13
---	-------

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4179

WILLIAM J. McDONALD, SR., and ELIZABETH J. McDONALD,
Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEES

ISSUES TO BE DECIDED

Whether the Tax Court erred in concluding that the taxpayer-attorney was entitled to claim a business expense deduction for a payment which he made in compromise of a Will contest.

STATEMENT OF FACTS

The objections to the Will and Codicil were withdrawn and the Will and Codicil were admitted to probate on November 15, 1972 (R. 10 stipulation 9).

Thereafter a written compromise agreement dated December 19, 1972 was finally executed by all of the parties and verified on April 12, 1973 and filed with the Surrogate Court of Ontario County. (R. 10, stipulation 10).

The Codicil which was prepared by the taxpayer was dated November 6, 1970 and revoked sub-section (B) of paragraph THIRD of the Last Will and Testament and ratified and republished the Last Will and Testament. (R. 17).

The taxpayer is the only individual in the Will identified by trade or profession and in the residuary clause, paragraph number five of the Will, is referred to as "my said friend and attorney." (R. 15).

The Tax Court found that the taxpayer was engaged in the practice of law and that an attorney-client relationship existed between the taxpayer and the decedent at all times prior to her death. The Tax Court further found that the Will contest was based upon an alleged breach of trust committed by the taxpayer-attorney and that the Will contest was directly connected with the taxpayer's practice of law. (R. 36).

SUMMARY OF ARGUMENT

The "origin and character of the claim" test does not apply to this case because the taxpayer does not claim a deduction for litigation expenses incurred in the defense of a claim against him.

The only litigation involved was a Will contest between certain heirs of the decedent and the taxpayer in his capacity as executor of her estate. The Will contest proceeding was a proceeding in rem in which no claim had been asserted against the taxpayer in his individual capacity. Since the taxpayer did not participate in any litigation in his individual, taxpayer capacity he neither incurred litigation expenses nor attempted to deduct any. The taxpayer's compromise payment qualifies as a business expense under the traditional "ordinary and necessary" test. It is undisputed that the taxpayer made the payment in question for the sole purpose of protecting his professional reputation.

Even if the "origin and character of the claim" test is found to apply, the taxpayer is entitled to a business expense deduction. In applying the Gilmore test, the Tax Court correctly found that the origin and character of the claim were so intimately related with the taxpayer as an attorney as to render the taxpayer's compromise payment deductible as a business expense. The Will contest proceeding was based on the allegation that the taxpayer had committed a breach of his fiduciary duty as an attorney. Furthermore the Will contest constituted an attack on the taxpayer-attorney's work-product.

The taxpayer's interest in the decedent's estate vested upon her death. The taxpayer actually received his legacy and only then made the payment in question. The source of taxpayer's funds for the voluntary payment to the Will contestants is immaterial.

ARGUMENT

THE TAX COURT WAS CORRECT IN RULING THAT THE TAXPAYER WAS ENTITLED TO A BUSINESS EXPENSE DEDUCTION UNDER SECTION 162 OF THE INTERNAL REVENUE CODE OF 1954 FOR \$121,400.00, THE AMOUNT WHICH HE PAID IN COMPROMISE OF A WILL CONTEST.

POINT I

THE "ORIGIN AND CHARACTER OF THE CLAIM" TEST DOES NOT APPLY WHERE A TAXPAYER MAKES A VOLUNTARY PAYMENT IN ORDER TO PRESERVE HIS PROFESSIONAL REPUTATION DESPITE THE FACT THAT COLLATERAL LITIGATION HAS BEEN INITIATED.

The rule that the origin and character of the claim must be examined in order to determine the deductibility of claimed business expenses was propounded in order to bring a measure of objectivity to the area of litigation expenses. In United States v. Gilmore 372 US 39, 48 (1962), the Supreme Court ruled that "the characterization as 'business' or 'personal,' of the litigation costs of resisting a claim depends on whether or not the claim arises in connection with the taxpayer's profit-seeking activity." (emphasis added to, and omitted from, original). In reaching that decision the Gilmore opinion cited Deputy v. Dupont 308 US 488 (1939) wherein it was stated at page 494:

"It is the origin of the liability out of which the expense accrues which is material." (emphasis added).

The Supreme Court further described the Gilmore decision in Woodward v. Commissioner 397 US 572, 578 (1969) saying:

"The court rejected a test that looked to the consequences of the litigation, and did not even consider the taxpayer's motives or purposes in undertaking defense of the litigation, but rather examined the origin and character of the claim against the taxpayer ..." (emphasis added)

This court denied a deduction for litigation expenses in Ditmars v. C. I. R. 302 F 2d 481, 488 (1962) where the claims were directed at "the totality that is the individual ..." (emphasis added)

It is apparent from the above citations that the "origin and character of the claim" test was designed only for those situations where the taxpayer himself incurs litigation expense in the course of prosecuting or defending a claim. The test is inapplicable to the present case because the taxpayer was not involved in the defense of a claim in his individual capacity and therefore did not incur, or attempt to claim a deduction for, litigation expenses. As the Commissioner concedes (Commissioner's brief p. 16) the litigation involved was not against the taxpayer but against the Will. This is because a proceeding to probate a Will is a proceeding in rem.

"The proceeding is, in form and substance, upon the Will itself. No process is issued against anyone; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but the instrument is, or is not, the Will of the testator."

Matter of Horton 217 NY 363, 368 (1916).

"A probate proceeding is said to be in rem. It is conducted for the benefit of all parties interested so that all may know whether decedent made a valid Will or died intestate. It is not a private dispute between individuals."

Matter of Roe, 65 Misc. 2d 143, 146 (Surrogate's Ct., Suffolk Co., 1970). See also Matter of King, 74 Misc. 2d 61 (Surrogate's Ct., Orange Co., 1973).

Not only was there no claim against the taxpayer as an individual, but also the taxpayer did not take an active part in the Will contest in his individual capacity and therefore incurred no expense concomitant with such a venture, in his individual, taxpayer capacity. Any active participation by the taxpayer in the defense or settlement of the Will contest proceeding was solely in his capacity as executor. It was in that capacity that the taxpayer had the power and indeed the duty to defend the Will contest.

"When a person who is named as executor in a Will offers it for probate and is met with a contest, it has been said that he has before him two alternatives, either of which he may adopt. He may cast the burden of the contest upon those who are to be benefited by the probated paper or he may assume the burden himself."

Warren's Heaton on Surrogate's Courts Volume 2A Section 183 Subd. 1.

"If a contest is threatened, the executor ought to remember, however, that he has been selected by the testator to stand in his place in the distribution of his property and should not weakly abandon the probate of the Will and throw the burden upon persons who might perhaps be poorly fitted to protect their rights."

Warren's Heaton on Surrogate's Court Volume 2A Section 183

Subd. 1B. Neither the taxpayer as an individual, nor Robert Rose, Malcolm Sawtelle, Muriel Sawtelle, or Wardell Ayrault, the other non-contesting testamentary beneficiaries, were required by law or did in fact take an active part in the conduct of the Will contest litigation.

The limitation of the "origin and character of the claim" test to cases involving claims against the taxpayer himself is consistent with the Gilmore decision. The Gilmore rationale rests on the conclusion that the deductibility of litigation expenses should

"not depend on the consequences that might result to a taxpayer's income producing property from a failure to defeat the claim..."

United States v. Gilmore (supra at 48, emphasis added). The opinion refers to the capricious results which would obtain if when

"two taxpayers are each sued for an automobile accident while driving for pleasure, deductibility of their litigation costs would turn on the mere circumstance of the character of the assets each happen to possess, that is, whether the judgments against them stood to be satisfied out of income or non-income-producing property."

United States v. Gilmore (supra at 48, emphasis added). In the present case the question of satisfying the judgment out of income-producing property never arises. First of all, there is no money claim against the taxpayer, second, the taxpayer's professional reputation could not be used to satisfy a judgment in any event.

The harm sought to be avoided does not result from a failure to defeat a claim as in Gilmore but rather from the very fact that the claim itself would receive publicity.

United States v. Gilmore (Supra) and subsequent decisions applying the "origin and character of the claim" test place great emphasis on the value of an objective standard by which to determine the deductibility of a claimed business expense. It is clear, however, that this standard was not designed to invalidate subjective considerations for every claimed business expense. The fundamental requirement that the expense be merely "ordinary and necessary" still applies to business expenses incurred other than in the prosecution or defense of a claim. The test of necessity is not whether the expected results are inevitable but whether one reasonably thinks they will occur. Levitt & Sons, Inc. v. Nunan 142 F 2d 795 (2d Cir. 1944); Straub v. Granger 143 F Supp. 250 (W.D. Pa. 1956). Taxpayers will not incur an expense unless required or justified by the needs of the business, therefore, the courts are hesitant to override the taxpayer's judgment as to the necessity for incurring the expense. Lilly v. Commissioner 343 US 90 (1952); Welch v. Helvering 290 US 111 (1933). As stated in Snow v. Commissioner 31 T.C. 585 (1958):

"It is sufficient if there are evident business ends to be served, and an intention to serve them appears adequately from the record."
(emphasis added)

Although an objective standard such as the "origin and character of the claim" test has a real value in facilitating certain determinations of deductibility, the application of the test should not be mechanically expanded to obscure what is, after all, the fundamental consideration: whether a given payment is an ordinary and necessary expense in the conduct of a business. A rule which would make the deductibility of a business expense dependent upon whether the party receiving the payment had asserted a claim against a third party would be an unwarranted distortion of the Gilmore rationale.

Because the payment involved is not a litigation expense the inquiry reduces to whether it was an "ordinary and necessary" business expense. It is well settled that the legal profession is a trade or business. Snow v. Commissioner (Supra); Pepper v. Commissioner 36 T.C. 886 (1961); Kaufman v. Commissioner 12 T.C. 1114 (1949). In the present case there is no claim against the taxpayer so that his compromise payment in his individual capacity must be deemed voluntary. Voluntary payments made for a bona fide business purpose are deductible.

In Gould v. Commissioner 64 T.C. 132 (1975) the taxpayer was the sole shareholder in a defunct corporation. He felt his employment with another corporation was in jeopardy because of his connection with the defunct corporation and the large debts it owed. When he paid some of the debts owed by his defunct corporation, the court held that they were deductible as business expenses:

"the petitioner is only required to carry his burden of proving that his motive for making the payments was to protect his job with IMC, and we are satisfied that he has carried that burden."

In Elmer W. Conti 31 T.C.M. 89 (1972) the taxpayer had sold control of a Federal financial institution by making grossly undersecured loans. The taxpayer made a voluntary payment to the financial institution to settle all claims against it and deducted the amount paid as an ordinary and necessary business expense. The payment was held deductible since the failure to make it would have had the obvious consequence of severe damage or total destruction of the taxpayer's business reputation.

In William L. Mitchell 52 T.C. 170 (1969), rev'd on other grds 428 F 2d 259 (C.A. 6, 1970). The taxpayer was granted a business expense deduction for his voluntary repayment of profits earned under his employer corporation's stock option plan. The payment was regarded as voluntary because no administrative or judicial determination of the taxpayer's liability under the Securities Exchange Act of 1954 Section 16B had been made at the time of his payment. Even though the payment did not concede liability it was deemed deductible because the taxpayer reasonably believed that his present employment and business reputation would have suffered if the payment had not been made. Since it is undisputed that the taxpayer's payment in the present case was made for the purpose of preservation of reputation, (Commissioner's brief p. 9 fn. 6; R. 11) the payment in question is a deductible business expense.

POINT II

IF THE "ORIGIN AND CHARACTER OF THE CLAIM" TEST APPLIES TO THE CASE AT BAR THEN THE PAYMENT IS DEDUCTIBLE AS A BUSINESS EXPENSE BECAUSE THE ORIGIN AND CHARACTER OF THE CLAIM ARE SO INTIMATELY RELATED TO THE TAX-PAYER AS AN ATTORNEY.

Even if the compromise payment is deemed to be a litigation expense within the meaning of U.S. v. Gilmore (Supra) the compromise payment is deductible as a business expense because the claim involved is so intimately connected with the taxpayer as an attorney. In order to understand why this is true it is necessary to examine the nature of the attorney-client relationship.

"That the relationship between attorney and client is one of an unusual character has been so often affirmed that a statement of the proposition is commonplace. There lie at its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one and make its obligations on the part of the attorney of the most exacting kind."

Matter of Dunn 205 NY 398 (1912). Indeed, an attorney is required to avoid not only professional impropriety in dealing with his client but also the appearance of impropriety. Cannon 9, EC 9-6, the Lawyer's Code of Professional Responsibility, New York State Bar Association, Appellate Division Rule, Fourth Department, Section 1022.17.

In the words of the Tax Court there is

"no question that petitioner was engaged in the active practice of law, and that an attorney-client relationship existed between petitioner and Mrs. Leckie at all times prior to her death. The taxpayer was described in the decedent's Will as 'my said friend and attorney'" (R. 15).

Not only was the taxpayer consistently described in the Will as an attorney, he also was the only individual identified by trade or profession. Although the taxpayer and the decedent were also friends, this fact in no way diminishes the simultaneous professional relationship that existed between them. The taxpayer was at all times acting in a fiduciary capacity towards the decedent and was obligated to observe the strict duties of that office.

The objections filed by the Will contestants indicate that the taxpayer-attorney is in effect charged with perverting the testamentary design of his client through undue influence. Such an allegation of a breach of the taxpayer's strict fiduciary duty amounts to nothing less than a direct attack on the taxpayer's professional activities. The Will contest succeeds or fails according to whether the following proposition can be substantiated: the taxpayer-attorney improperly influenced his client to make a bequest for the taxpayer-attorney's own benefit. Thus, the very core of the Will contest is concerned with the taxpayer's professional conduct as an attorney. This reasoning is entirely consistent with

the taxpayer's contention in Point I herein that there was no claim against him. It is clear that the claim in question originated from, and is intimately connected with, an alleged breach of the attorney-client relationship even though the suit itself is not directed against the taxpayer. The distinction is that of the subject of a law suit versus its object.

Just as the taxpayer's motive is irrelevant in determining whether the origin and character of the claim test has been satisfied, also irrelevant are the contestant's motives in initiating the Will contest.

It is unlikely that the Will contest would have been undertaken at all were it not for the taxpayer's professional activity of drafting the Codicil to the Will. The difficulty in succeeding in a Will contest is common knowledge.

"It is safe to say that there is nothing in the law more difficult than to have a properly executed Will denied probate. As will hereafter be pointed out, the degree of mentality sufficient to enable a testator to make a valid Will need not be great. More than that, the undue influence sufficient to break the Will must be such as to make the instrument practically that of the one exercising influence rather than that of the testator. To show the necessary facts is, therefore, difficult."

Warren's Heaton on Surrogate's Courts Volume 2A Section 184 Subd. 1. This is especially true in the immediate case where the taxpayer-attorney has an exemplary reputation in the community (R. 11) and as the Commissioner concedes (Commissioner's brief p. 13) there was no apparent basis for the Will contest. The task is made easier,

however, when the attorney who drew the Will or Codicil benefits from it.

"The law, recognizing the delicacy of the situation, requires the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made... In the absence of any explanation, the jury may be justified in drawing the inference of undue influence, although the burden of proving it never shifts from the contestant."

Matter of Putnam 257 NY 140 (1931).

"Substantial gifts by a decedent to an attorney-draftsman are scrutinized most carefully and will not be sustained where the circumstances are suspicious unless those circumstances are satisfactorily explained"

Matter of Zurkow 74 Misc. 2d 736, 740 (Surrogate's Ct., New York Co., 1973). The contestants may have believed that the probability of a successful Will contest was increased because the taxpayer drafted the Codicil. (R. 9). This is true not only because the taxpayer benefited from the Codicil itself but also because a Codicil acts to republish the Will.

"A Will and Codicil are to be construed together as if both have been executed at the same time in the absence of a manifest intention to the contrary."

Matter of Nicholas 33 NY 2d 174, 177 (1973).

"A Codicil is part of the Will, and the two are to be read and executed as one entire instrument."

Bloodgood v. Lewis 209 NY 95 (1913).

"The effect of a Codicil is to republish the Will and make it speak again from the new date."

Matter of Campbell 170 NY 84 (1902); Matter of Howe 15 AD 2d 396

(4th Dept. 1972). Therefore, both the Codicil and, by relation, the Will can be deemed to be the result of the taxpayer's professional activities as an attorney. Any attack on these instruments will therefore have its origin in the taxpayer's business.

The Codicil was attacked on the further ground that it was improperly executed. Since it was the taxpayer's professional responsibility to attend to the due execution of the Codicil, this claim arises from his business activity. It should also be noted that the Codicil could not have been attacked on any ground if the taxpayer had not drafted it since it would not have existed.

The decision of the Tax Court rests squarely on a finding that the "origin and character of the claim" test is satisfied in the present case.

"In our judgment the alleged breach of trust underlying the Will contest suit was directly connected with petitioner's practice of law, whether or not it ever actually occurred."
(R. 37).

The Tax Court referred to the petitioner's motive in making the compromise payment not as a basis for its decision but merely to reply to the Commissioner's contention to the contrary.

"Respondent contends that the petitioner compromised the suit and insured probate of Mrs. Leckie's Will primarily to preserve some portion of his inheritance. The record does not support that argument... The only evidence before us supports petitioner's assertion that he acted to protect his business reputation and future earnings. Respondent's case dwells entirely upon suspicions and unsupported allegations." (R. 38).

POINT III

THE TAXPAYER'S INTEREST IN THE ESTATE OF THE DECEDENT VESTED AT HER DEATH; HE RECEIVED HIS LEGACY AND THEN MADE A PAYMENT IN ORDER TO PRESERVE HIS REPUTATION, NOT IN ORDER TO OBTAIN TAX-FREE INCOME.

The taxpayer's interest in the Leckie Estate vested on the death of the decedent. Stringer v. Young 191 NY 157 (1908); Matter of Kroos 302 NY 424 (1951); Matter of Murphy 144 NY 557 (1895); Matter of Dunham 36 AD 2d 467 (3d Dept. 1971). The burden of proof is upon the contestant to establish a claim of undue influence. Matter Schillinger 258 NY 186 (1932). The fact that a testamentary beneficiary's title to a legacy is subject to divestment upon the operation of a judgment of the Surrogate's Court is irrelevant unless and until such judgment is actually rendered. All property which the taxpayer owns is subject to divestment upon the operation of a judgment of a court of competent jurisdiction. It has been stipulated in the present case that the taxpayer actually received the testamentary bequest to which he was entitled and only then made the payment after the Will was probated. (R. 11) Although it is true as the Commissioner contends

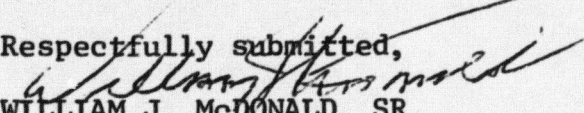
(Commissioner's brief p. 18 fn. 12) that the taxpayer would not be entitled to a deduction if he had accepted none of the bequests under the Will, that hypothetical situation has no relevance to the present case. Where a legacy is beneficial its acceptance will be presumed in the absence of a timely renunciation. Matter of Wilson 298 NY 398 (1949); Matter of Waring 293 NY 186 (1944). In any event, it is undisputed that the taxpayer accepted his testamentary bequest in this case.

It is incorrect to say that the deduction should be denied because the taxpayer was obligated to make the payment in question. The obligation arose only after the entry of the order of the Surrogate's Court confirming the compromise agreement. Prior to that time, the taxpayer in his individual capacity voluntarily agreed to make the payment in question. It was the voluntary agreement which bound the taxpayer and not the formalization of that agreement by the Surrogate's Court. Furthermore, there was no necessary connection between the taxpayer's receipt of the testamentary bequest and the payment of the sum sought to be deducted. Because the taxpayer's title never divested, it is immaterial whether the legacy was actually used to make the payment. It is the fact that the taxpayer had title to the money paid which is controlling and not the source of the money among the taxpayer's various assets.

It is clear upon this record that the taxpayer made the payment in question in order to protect his professional reputation. The Tax Court (R. 38) and the Commissioner (Commissioner's brief p. 9, fn. 6) agree. Since the taxpayer's motivation is clear, the Commissioner should not be heard to claim that the payment was made in order to obtain a tax-free legacy.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

 WILLIAM J. McDONALD, SR.
 Petitioner-Appellee, pro se

WILLIAM J. McDONALD, JR.
 On the Brief

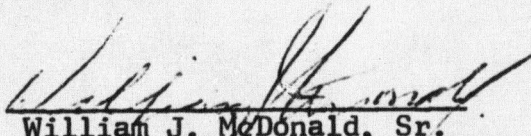
JANUARY, 1978.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on appellant by mailing two copies thereof to him this 17th day of January, 1978, in an envelope, with postage prepaid, properly addressed to him as follows:

M. CARR FERGUSON,
Assistant Attorney General,

GILBERT E. ANDREWS,
 WILLIAM S. ESTABROOK,
 THOMAS M. WALSH,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.


 William J. McDonald, Sr.
 Petitioner-Appellee, pro se